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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-413

OTIS R. BOWEN as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General
of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction
of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION,
a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein, et al.

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Memorandum in Opposition to Petition for Writ of Certiorari

For the reasons set forth in this Memorandum, respondent Board of School Commissioners of the City of Indianapolis (IPS) submits that this interdistrict school segregation case is not in appropriate posture for Supreme Court review at this time, *prior* (a) to the required district court findings concerning the current cross-district impact of all constitutional violations found (A-47 to A-48) *and* (b) review by the court of appeals concerning intent and the existence of any interdistrict violation at all, as well as the appropriate scope of remedy (*see* A-47 to A-48; 573 F.2d 400, 405 and n.4, 410 and n.22, 414). Where

the Court of Appeals is taking appropriate action to insure that the interdistrict aspects of this case are finally and fully evaluated according to the controlling legal standards of *Washington v. Davis, Arlington Heights, Swann* and *Dayton Board of Education* pursuant to this Court's remand (429 U.S. 1068) and subsequent decisions, without any undue delay in implementing interdistrict relief pending the necessary interdistrict determination (*see, e.g.,* A-33 to A-36), there is no warrant for deviating from the normal appellate process. Rule 20, Supreme Court Rules. To the contrary, only the further proceedings in the district court, followed by full review by the Court of Appeals of all interdistrict liability and remedy issues, will insure that this protracted litigation is brought to a just and complete resolution and thereafter, if warranted, review by this Court.

A brief summary of the recent proceedings demonstrates that this Court should deny any writ of certiorari before review of the interdistrict liability and remedy issues by the Court of Appeals: [1]

1. Following this Court's vacating and remanding (429 U.S. 1068) of the Court of Appeals judgment affirming an interdistrict remedy (541 F.2d 1211), the Court of Appeals remanded to the district court for further proceedings to determine (a) intent and the existence of any interdistrict violation at all and (b) the extent of the current cross-district impact of any such violations in order to tailor an appropriate remedy. 573 F.2d 400.

[1] Also pending is the State's previous petition for a writ of certiorari (No. 77- 1614) to review the Court of Appeals initial remand (573 F.2d 400) to the district court to make the requisite intent and impact findings. In both petitions, the State proceeds under the erroneous assumption that this Court's remand (429 U.S. 1068) is a summary reversal requiring dismissal of the interdistrict cause of action rather than a remand for further proceedings to determine the case pursuant to controlling legal standards. The Memorandum of IPS in opposition to the petition for a writ of certiorari in No. 77-1614 demonstrates the lack of merit in the State's position.

2. IPS developed an intradistrict plan to remedy the *de jure* segregation previously finally determined within IPS (*e.g.,* 332 F.Supp. 665, 474 F.2d 81, *cert. denied* 413 U.S. 920) and by motion (concurred in by the original Plaintiff United States) sought its immediate implementation pending the interdistrict determinations; IPS by motion also sought the opportunity to present evidence on the interdistrict violation and remedy issues (including alternative remedies) pursuant to the remand from the Court of Appeals.[2] Following preliminary skirmishes over the merits of intradistrict relief pending interdistrict determinations (*e.g.,* unpublished district court entry of April 7, 1978, denying intradistrict relief; unpublished Court of Appeals order of May 17, 1978, requiring reconsideration; district court's unpublished June 2, 1978 order, A-1 to A-13, denying intradistrict relief), the Court of Appeals on expedited appeal reversed the district court and directed that those portions of the IPS intradistrict plan which could by then be feasibly implemented for the fall go into effect immediately, while reserving consideration of other aspects of intradistrict relief for full briefing and argument. A-33 to A-36. The State's petition does not challenge this judgment.[3]

3. Concurrently, the district court in a separate memorandum opinion (A-13 to A-27) expressly applied *Washington v. Davis* and *Arlington Heights* (including historical background, sequence of events, substantive departures

[2] Thus, petitioner's suggestion (Pet. 5, 11) that plaintiffs' subsequent remand motion, for trial court hearing and determination of outstanding interdistrict issues, in the Court of Appeals (*e.g.,* A-37 to A-45) was belated or otherwise improper is ludicrous.

[3] In view of this decision, the State apparently has dropped its earlier claim that a primary reason for premature Supreme Court review of interdistrict issues before their fair and full resolution by the courts below would be the asserted delay in implementing intradistrict relief. *Compare* IPS Memorandum in Opposition to Certiorari in No. 77-1614, pp. 3-4.

from longstanding state policy, A-14 to A-20) to the record evidence in finding: (a) "that the actions of the General Assembly [with respect to boundary lines and powers] were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County" (A-19 to A-20) and (b) that intentionally segregative state school and housing customs, policies and practices also contributed to the current interdistrict segregation (A-15 to A-16, A-20 to A-25). In its memorandum opinion, however, the district court again ignored the IPS request to present alternative remedies and evidence on the cross-district segregative impact of these two violations (as well as the previously determined intentional racial segregation and identification of over a score of IPS schools as "colored") *and* the Court of Appeals' express directions in its previous remand to make specific findings on the cross-district impact of all the constitutional violations found in order to develop a remedy to fit the violation. Instead, the district court only evaluated the impact on blacks (but not whites) of one aspect of one of the violations (intentionally segregative location of public housing) and ordered a limited, one-way, blacks-only interdistrict remedy. A-24 to A-31.

4. The Court of Appeals sought advice from the affected parties on how to resolve the many appeals from the district court's intra- and inter-district rulings (A-32) and then suggested a reasonable approach to permit timely and complete resolution of the entire case in its expedited ruling on a portion of the intradistrict appeal (A-35). Pursuant thereto, IPS moved for a limited remand from the Court of Appeals to require the district court to hear alternative remedy proposals and to make the requisite findings concerning the total impact of all the constitutional violations mandated by the Court of Appeals' original

remand and the case law. A-37 to A-45. The Court of Appeals ordered such a limited remand so that the district court could determine "which alternative remedy . . . is necessary and equitable to overcome the combined effect of all the constitutional violations previously found by the district court." A-47 to A-48. The Court of Appeals also specifically directed that all other issues, including but not limited to, "intent and the existence of any interdistrict violation at all are preserved for decision by this Court on the pending appeals and such subsequent appeals as may be filed from the orders of the district court on this limited remand." A-48.

5. Subsequently, IPS filed alternative remedy proposals in the district court and a detailed offer of proof on the outstanding issues pursuant to this limited remand. Responses by the parties and hearing and determination by the district court are expected promptly. Appeals from the district court's ruling can then be joined with the pending appeals to permit the Court of Appeals to review fully and fairly the existence and extent of the cross-district impact of any violation and appropriateness of any remedy finally ordered in view of the complete findings mandated by the Court of Appeals' original remand and assured by the Court of Appeals' present limited remand.

No party can object that the procedure established by the Court of Appeals prejudices any material right or is designed to do anything other than to permit a full and fair resolution of this case pursuant to controlling legal standards. Undaunted, petitioners appear to argue either (a) that they wish the case would be dismissed forthwith in midstream rather than be heard and fully determined (Pet. 11-16) or (b) that the Court of Appeals has now erred in requiring the district court to make precisely the findings on the impact of the violation whose omission to this point petitioners cite as error (Pet. 16-17).

Put bluntly, petitioner's alternative positions are devoid of merit. As set forth above, the Court of Appeals has faithfully adhered to this Court's remand and subsequent decisions. The district court has made intent findings based on the controlling legal standards and has been required by the Court of Appeals' limited remand to make the requisite impact findings in order fairly to tailor any remedy to overcome the effects of the violation found. Once these determinations have been made, the case can be fully reviewed (both as to violation and remedy) by the Court of Appeals and, thereafter, by this Court if appropriate. Given this Court's remand for precisely such further proceedings in the courts below (429 U.S. 1068), it astounds us that Petitioners would have the temerity even to suggest that this Court should pretermit the proceedings below before they have been completed in the district court, let alone subjected to normal appellate review by the Seventh Circuit. *Cf.* Rule 20, Supreme Court Rules. Yet when petitioners even sought a stay of the proceedings below pending decision on their petition for a writ of certiorari, Circuit Justice Stevens properly denied the stay application forthwith.

CONCLUSION

WHEREFORE, for the foregoing reason, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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